

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2794 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

NAZIRBHAI A SHAIKH

Versus

STATE OF GUJARAT

Appearance:

MS KHYATI P HATHI for Petitioners

MR SK PATEL for Respondents

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 04/11/1999

ORAL JUDGEMENT

1. The petitioners, employees of the Health and Medical Services and Medical Education Department, by this petition under Article 226 of the Constitution are praying for quashing and setting aside of the order annexure 'E' dated 7th October, 1988 made by the respondent No.2. Further prayer has been made for their deemed absorption in the Government services from 1-4-1987 along with other members of the Rural Health

Centre at Dharampur which is taken over by the State Government in pursuance of its resolution annexure 'C'. Last prayer is made for all the consequential benefits flowing therefrom.

2. The facts which are not in dispute are as follows:

Damien Foundation, an international organisation for Leprosy having its Head office at Belgium and office in India at Madras established a Leprosy Control Unit at Dharampur in Valsad District of Gujarat State, after obtaining permission from the Govt. of India, on 20-3-1980. In the Leprosy Control Unit at Dharampur, the petitioners (Para Medical Workers/Leprosy Assistants), were appointed as Leprosy Assistants by the said foundation after inviting applications for open selection. They had also undergone training at a recognised Leprosy training centre. These appointments were made in the month of November, 1983 on probation. The appointment orders are there on the record as annexures 'A' and 'B'. In the year 1986, both the petitioners were confirmed. Vide resolution annexure 'C' dated 4th April, 1987, the State of Gujarat resolved to take over the control and management of the Leprosy unit at Dharampur w.e.f. 1-4-1987. This resolution inter-alia provides to take over the staff working in that Unit in the services of the Government by absorption w.e.f. 1-4-1987. Out of ten staff members of the foundation, eight were taken. The petitioners were excluded on the ground of overage and their services were deemed to be terminated w.e.f. 31-3-1987. The petitioners made representation to the State Government and ultimately under the resolution annexure 'D' dated 15th August, 1988 after giving relaxation in the age limit as a special case, they were absorbed in the Government services as Leprosy Assistants. Copy of this resolution is there on the record of this special civil application as annexure 'D'. The respondent No.2 under its order dated 7th October, 1988, annexure 'E' gave the appointment to the petitioners as Leprosy Assistants subject to the condition that they will be junior to other employees who are otherwise absorbed earlier to them. They will not be entitled to count their former services. Their appointments will be treated as fresh appointments. The petitioners in pursuance to that order resumed their duties on 14th October, 1988. Against these conditions as incorporated under the order dated 7th October, 1988 by the respondent No.2 they made a representation. They filed an appeal before the Tribunal in the month of September, 1990. Their appeal came to

be dismissed only on the ground of want of jurisdiction. Hence, this petition before this court on 6th March, 1992. The writ petition was admitted on 14th March, 1993 after notice to the respondents.

3. As usual, the respondents have not cared to file reply to the special civil application, and as such, the averments made by the petitioners in the special civil application stand uncontroverted and the same are to be taken to be admitted.

4. Ms. Khyati P. Hathi, learned counsel for the petitioners contended that in the matter of absorption of employees of the Foundation, the respondent- State of Gujarat, a Welfare State, made a hostile discrimination. Though all the employees were similarly situated, the petitioners were singled out on the ground of age bar. Ms. Khyati P Hathi, learned counsel for the petitioners submits that in the Foundation, the recruitment of the petitioners was made after their selection and their appointments were substantive appointments. They were not absorbed on the ground that as per the recruitment Rules of the State Government they were age bar. Next it is contended that the State of Gujarat has considered the cases of the petitioners and under its resolution dated 15th August, 1988 as a special case, relaxing the age limit they were absorbed in the Government services as Leprosy Assistants. In that order, no condition has been put. The respondent No.2, who is a subordinate officer of the State Government has no right or authority or competence to put all such conditions. Carrying this contention further, learned counsel for the petitioners contended that the order of the Government is for absorption of the petitioners in Government services and not to give fresh appointments to them. The order of respondent No.2, annexure 'E' is repugnant to the resolution of the State Government and only on this ground, the same deserves to be quashed and set aside. Because of this order, the petitioners are suffering heavy monetary loss. Lastly, it is contended that otherwise also before passing of the order dated 7th October, 1988, the petitioners have not been given an opportunity of personal hearing.

5. Shri Patel orally contended that annexure 'C' is the resolution of the State Government to take over this Foundation Unit is very specific and only those employees thereof are to be absorbed in Government services who fulfil the eligibility as laid down under the Recruitment Rules of the State Government. The petitioners were not fulfilling the eligibility and they were not absorbed in

the services. As a special case, the Government relaxed the eligibility and under annexure 'D', the Director of Health and Medical Services and Medical Education Department, Gandhinagar was directed to take necessary action for appointment and for further action of the said employees. From this part of the resolution, annexure 'D', the Director of Health and Medical Services and Medical Education Department, Gandhinagar was given all powers and authorisation to put necessary conditions in the appointment orders of the petitioners. It has next been contended that when the relaxation has been made in the age limit, the respondent No.2 has all the right to put the conditions. In his submission, in case the petitioners were given all the benefits then those employees of the Foundation who were otherwise eligible as per the Recruitment Rules will suffer loss. They were though senior to the petitioners will become junior and any relief in case is granted in this case to the petitioners, it will adversely affect their rights. Lastly, it is submitted that the absorption of the employees of the Foundation Unit is not the right of the petitioners and they could have been absorbed in the Government services with conditions.

6. I have considered the rival contentions of the learned counsel for the parties.

7. Resolution annexure 'C' of the State Government is on the record of this special civil application but the other resolutions reference of which has been made therein have not been produced on the record by the respondents. Be that as it may. I find from the resolution annexure 'C' that in the previous resolution there was a decision to take over the Foundation Unit and the staff working with the Unit will have to be absorbed by the State Government. This unit has been taken over by the Government w.e.f. 1-4-1987 subject to the condition that only eligible or entitled members of the staff will have to be absorbed in consultation with the General Administration Department and Finance Department. In pursuance of the resolution aforesaid there is no dispute that other members of the staff of the Unit have been absorbed but the petitioners were not absorbed as they were not fulfilling the age eligibility but for age eligibility the petitioners could have been absorbed like other employees of the Unit. Learned counsel for the respondents has not disputed and he could not have disputed that the power vests with the State Government to relax the age eligibility as provided under the Recruitment Rules in appropriate cases. In the case of the petitioners, on their representations the matter has

been considered and relaxation has been granted in their age eligibility as a special case. Annexure 'D' is there on the record wherefrom I find that the State Government has resolved to absorb the petitioners in Government services as Leprosy Assistants. This decision has been taken by the State Government and the absorption of the petitioners was not subject to any condition. Absorption and appointment are two different things. It is true that one of the sources of recruitment is absorption but the appointment on absorption can not be synonymous to the appointment to be made by direct recruitment. Appointment by absorption is the appointment of a person who is already in the service elsewhere i.e. in the Unit/Centre, management and control of which has been taken over by the State Government. I find sufficient merits in the contention of the learned counsel for the petitioners that the respondent No.2 has no right or competence or authority to give the petitioners fresh appointments and to put further conditions which are onerous conditions. Clause-3 of this resolution annexure 'C' has to be read in context of clause 2 of the resolution. It can not be read in isolation as what it is tried to be done by Shri S.K. Patel, learned A.G.P.. Naturally on this decision taken by the State Government for relaxation of age eligibility, the petitioners are to be absorbed in the Government services as per the resolution annexure 'C'. The resolution annexure 'D' and more so clause-3 thereof has to be read, considered and interpreted in the context of the purpose and object of annexure 'C'. Once the State Government has decided to absorb the employees of the Unit/Centre in the Government services though subject to fulfillment of age eligibility as provided under the Recruitment rules by those persons no distinction can be made in the cases of the employees who fulfil the age eligibility and those employees who were not fulfilling the age eligibility but in their cases that eligibility has been relaxed. Once the State Government has power to relax the age eligibility and it has relaxed then for all the purposes these petitioners are to be taken or deemed to have been taken at par with the other employees of the Unit/Centre who were absorbed in the Government services. The order annexure 'E' under which the petitioners were given appointment as fresh appointment is not correct. Once the State Government has decided to absorb these persons after relaxation of age limit they will be deemed to have been absorbed in the Government services w.e.f 1-4-1987. The question of seniority is not at this stage to be taken into consideration. It is a case of absorption and accordingly the order would have been passed by respondent No.2.

8. Learned counsel for the petitioners though insisted for further consequential benefits to be given to the petitioners i.e. continuation of service, seniority but that cannot be decided at this stage for the reason that it will adversely affect the right of other persons who are not before this court. The question of seniority vis-a-vis other persons who have been absorbed in the Government services is left open for the respondent No.2 to decide after hearing all the concerned parties but the order annexure 'E' to the extent it gives fresh appointment to the petitioners on the post of Leprosy Assistants can not be allowed to stand. The petitioners will be taken to be absorbed in the Government services from 1-4-1987 and as a result thereof they shall be entitled for all the other benefits except seniority which has to be decided by the respondent No.2 after hearing all the concerned parties.

9. In the result, this special civil application succeeds and the order annexure 'E' dated 7th October, 1988 of the respondent No.2 is quashed and set aside. As a result of the quashing and setting aside of that order, the petitioners shall be entitled for all the consequential benefits except the claim of seniority in the cadre concerned which has to be decided by the respondent NO.2 after hearing all the concerned parties. Rule is made absolute in the aforesaid terms.

10. It is a case where these low paid employees have unnecessarily been dragged into litigation by none other than the officers of a Welfare State. It is a case where notice has been given to the respondents but they have not cared to file reply. The court has admitted the petition and even thereafter they have not filed the reply. The petitioners are the low paid employees and litigation before this court costs heavily for which they have to be compensated. The respondent - State of Gujarat is directed to pay Rs.2000/= as costs of this petition to the petitioners.

zgs/-